# Award No. 15724
# Docket No. TE-16786

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

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**PARTIES TO DISPUTE:**

**THE BALTIMORE AND OHIO RAILROAD COMPANY**

**TRANSPORTATION-COMMUNICATION EMPLOYEES UNION**

STATEMENT OF CLAIM: The assignment of work to two jobs each trick around the clock seven days a week involved in the operation of RCA 3301 Computers and supporting equipment located at Baltimore, Maryland.

CARRIER'S STATEMENT OF FACTS: Under date of May 17, 1966, the Carrier's Manager–Labor Relations addressed the following communication to then General Chairman P. E. Tyndall of the Transportation-Communication Employees Union dealing with a Carrier proposal to "install a communications switching system in the Central Office Building in Baltimore, Maryland":

"Dear Sir:

It is proposed to install a Communications Switching System in the Central Office Building in Baltimore, Maryland.

At present, reports of movements of cars are transmitted by teletype from origin location to one or more yard locations and the 10th floor, Central Building, where monitored copies are received on teletype and removed therefrom by employes coming under the Telegraphers' Agreement. Baltimore is a receiving-only terminal for those transmissions.

It is proposed to connect the train consist teletype circuits to the electronic switcher, with the monitor teletype machines now on the 10th floor to be relocated in GO Office on the mezzanine floor, where employes coming under the Telegraphers' Agreement will monitor and remove from the teletype machines copies of all train consist transmissions.

Also, at present, the sorting and preparation of DOT reports are made in the Univac III Computer, and furnished to the telegraphers properly coded and addressed in punched paper tape form. Telegraphers now sort these tapes and transmit them (DOT reports) to Freight Sales offices on teletype circuits.

It is proposed that Freight Sales office teletype circuits will be wired direct to the electronic switcher. The DOT reports will be prepared by the electronic switcher, and transmissions will be

SECTION 7.
SENIORITY

This Memorandum of Understanding is supplemental to the Telegraphers' Agreement and does not modify or supersede any of the rules of said Agreement, except as specified in this Memorandum.

SECTION 8.
EFFECTIVE DATE AND CHANGES

This Memorandum of Understanding is effective as of February 17, 1945, and will remain in force unless and until changed in the manner prescribed by the Railway Labor Act, as amended.

A C C E P T E D

| FOR THE BALTIMORE AND OHIO RAILROAD COMPANY | FOR THE ORDER OF RAILROAD TELEGRAPHERS |
|---|---|
| /s/ A. S. Hunt<br>General Supt.–Communications | /s/ B. N. Kinkead<br>General Chairman |
| /s/ W. G. Carl<br>Supt.–Wage Bureau | /s/ G. A. McBride<br>Gen. Secy.-Treasurer |
| | /s/ H. R. Clark<br>Member Reduced Committee" |

When the Agreement was reprinted in 1948, the above Memorandum was included in the Agreement as Article 31.

This Article 31 of the 1948 Agreement was revised effective September 24, 1959, and when the Agreement was reprinted in 1960, was renumbered and appears as Article 36 of the current Agreement.

The Statement of Claim or Question at Issue presented by the Carrier does not assert a claim, per se, nor does it pose a question in an interrogative form. It does, however, describe the essence of the dispute. "The assignment of work to two jobs." Carrier contends the two jobs in question should be assigned to employes covered by and holding seniority under its Agreement with the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes. This Organization contends the two jobs in question should be assigned to employes covered by and holding seniority under the Agreement between the Carrier and the Transportation-Communication Employees Union. This is the dispute between the parties now before your Board for adjudication.

(Exhibits not reproduced.)

**OPINION OF BOARD:** As part of a plan to promote efficiency and to render better service to the shipping public, the Baltimore and Ohio has established at Baltimore, Maryland, a "Computer Operations Center" to perform the data processing work formerly performed by computers on the Chesapeake & Ohio Railway and by computers on the Baltimore & Ohio

Railroad. The establishment of such "Center" is pursuant to agreements entered into by the two railroads and the Brotherhood of Railway and Steamship Clerks. Included in the computer complex, in addition to computers previously in service, are two RCA 3301 computers. It is the assignment of the work of supervisory control functions of the two RCA 3301 computers that is the subject of this dispute; the work and positions having been assigned by the B&O to clerical employes covered by the agreement with the Brotherhood of Railway and Steamship Clerks. Since the RCA 3301 computers include electronic communications switching, the Transportation-Communication Employees Union made claim to the work of the two supervisory control positions on each trick, seven days per week. When the B&O refused to meet the demands of the TCEU, that organization on or about January 16, 1967, commenced a strike to enforce its demands. The B&O secured a restraining order from the United States District Court for the District of Maryland. This restraining order required that the BRC be brought into the court proceedings and that the dispute be submitted to this Board by the B&O. Thereafter, a preliminary injunction was issued.

This Division of the Board has found that the Brotherhood of Railway and Steamship Clerks is involved in this dispute, and that such Organization is an indispensable party to these proceedings. Hearing was held at 10:00 A. M., April 25, 1967, at which time all parties involved were given opportunity to be heard.

The contention of the TCEU is predicated primarily upon the Scope Rule (Article 1) of its Agreement with the Baltimore and Ohio. This rule reads:

"SCOPE.

(a) The following rules and rates of pay shall apply to all positions held by telegraphers, telephone operators (except switchboard operators), agents, agent telegraphers, agent telephoners, towermen, levermen, tower and train directors, block operators and staff men specified in the subjoined wage scale, hereinafter referred to as 'Employes.'

PAY ROLL CLASSIFICATION.

(b) When existing pay roll classification does not conform to paragraph (a), employes performing service in the classes specified therein shall be classified in accordance therewith."

A mere reading of the foregoing Scope Rule indicates it to be of the general type. It does not define or describe work, but only lists by title the classes of employes covered by the terms and provisions of the Agreement. Certainly the work which is the subject of this dispute is not specifically mentioned.

In interpreting such general type scope rules this Board has consistently applied the principle of determining whether or not the work in dispute has been performed solely and exclusively by the party claiming the right to such work through practice, custom and tradition. We have also held that the burden of proving such sole and exclusive right is on the party making such contention by submission of competent supporting evidence.

The TCEU has failed to show a sole and exclusive right to the work and positions that are the subject of this dispute through custom, practice and tradition. Its contention that the Scope Rule of the Agreement has been violated is, therefore, rejected.

Reference has also been made by TCEU to Article 36 of its Agreement with the B&O. Its submission is completely devoid, however, of any assertion that such rule has been violated and contains no argument to support any such allegation, if one be intended. That rule deals with positions requiring the use of telegraphers in the operation of printing telegraph machines or similar devices and, briefly, provides that telegraphers will operate such machines in telegraph offices except as otherwise provided in the rule. It also provides that in other than telegraph offices such machines may be operated by other than telegraphers subject to certain restrictions. Since we are not here dealing with a telegraph office, and since no argument is advanced to support a violation of the rule, it is clearly evident that no violation of this rule has occurred.

In further argument to support its position, the TCEU, in effect, argues that one of the RCA 3301 computers acts as a "processor" and the other as a "switcher", and that the "switcher" performs the work of switching messages. Such argument is ably refuted in the record by the B&O as well as by the BRC. Additionally, it is to be noted that in paragraph 1 of the Stipulation, which is a part of the Restraining Order previously referred to, the TCEU acknowledged and agreed that the supervisory control functions are an integral part of the RCA 3301 Computer System. This paragraph reads as follows:

> "The parties agree to the entry of preliminary injunction as prayed for in the complaint to remain in effect until the final determination, pursuant to proceedings before the National Railroad Adjustment Board, Third Division, respecting the issue of the assignment of two positions, each trick, around-the-clock, 7 days a week, performing the so-called supervisory control functions which are an integral part of the RCA 3301 computer system — the issue which, by the submission a copy of which is attached as Exhibit No. 5 to the First Amended Complaint, has already been submitted by the Baltimore and Ohio Railroad Company to the Third Division."

We also take note that the B&O served notice of force reduction upon the TCEU under date of May 17, 1966, and that immediately thereafter, on May 31, 1966, the TCEU served a Section 6 notice on the B&O of desire to negotiate a rule reading as follows:

> "Mechanical and/or electronic machines and devices operated manually, semi-automatic or automatic, used for any purposes, which receive and/or transmit information or data between locations shall be recognized as communication devices, and shall be operated exclusively by employes covered by this current agreement."

If the existing agreement prohibited the B&O from assigning the work and positions of supervisory control functions to other than telegraphers, there would have been no need for an additional rule such as was requested

by TCEU. The proposal constitutes an admission that the B&O could act as it did without violating the Telegraphers' Agreement.

In the submission of the Brotherhood of Railway and Steamship Clerks to this Board, the following statement appears:

> "Under this agreement (the B&O Clerks' Agreement), clerical forces of the B&O represented by BRC have occupied **all positions** in the operation of the Carrier's computers. Prior to the installation of the RCA 3301 computer system here involved, the B&O operated a D-1000 Data-Matic Computer and Univacs. These computers all have supervisory control functions comparable to the supervisory control functions here involved and all of these functions are and always have been performed by clerks.
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> In fact the consolidated B&O–C&O computer center will continue to make use of the Data-Matic and Univacs (the Data-Matic will eventually be phased out) with the supervisory control function performed by clerks as it always has been. Thus, the TCEU argument leads to the incongruous situation in which the supervisory control function on the RCA 3301 system in the computer operation would be performed by telegraphers while the supervisory control function on the other computers would continue to be performed by clerks.
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> Indeed, the supervisory control function of the Univac computer engaged in the B&O train consist work as a part of the over-all DOT operation is and always has been performed by clerks. The DOT operation is now being transferred to the RCA 3301 computer system. Thus, TCEU is asking this Board to take away one of the functions long performed by clerks under their B&O contract and turn it over to telegraphers.
>
> In summary, no telegrapher has ever occupied any position on any computer performing B&O work, including the supervisory control functions of such computers."

While TCEU had opportunity to refute the BRC assertions concerning the use of clerical employes to perform supervisory control of computer functions as a past practice under the B&O Agreement with the BRC, it is noteworthy that no exception was taken thereto.

Consideration of the entire record, the applicable agreements covering clerical employes and telegraphers and the evidence as to usage, practice and custom pertinent to those agreements fails to support the contention of TCEU that employes within the scope of its Agreement should be assigned to the work and positions in question. There has been no violation of the Telegraphers' Agreement by the B&O in assigning the work and the positions to its clerical employes.

**FINDINGS:** The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Baltimore and Ohio Railroad did not violate its Agreement with the TCEU by the assignment of the work and positions to clerical employes.

AWARD

The position of the B&O that the work and positions were properly assigned to clerical employes is sustained, and the claim of TCEU that its agreement was violated is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 5th day of July 1967.

DISSENT TO AWARD 15724, DOCKET TE-16786

Award 15724 is improper and erroneous for at least two reasons: (1) The case of which it purports to dispose was not handled by the Third Division in the usual manner nor in accordance with its long established rules of procedure, customs and practices; nor was it given proper consideration as contemplated by the Railway Labor Act. (2) The award improperly describes the dispute and fails to give proper consideration to the merits thereof.

FIRST — The dispute was submitted to the Third Division ex parte by the Carrier and, except for certain attempts by representatives of the parties to assist the Division in expediting its handling — which attempts were in the end irrelevant and were accommodated without materially affecting the Division's procedures — was handled as expeditiously as possible up to the point where the file was closed to any further submissions by the Members of the Division.

From this point forward, however, the case was not given consideration in the usual manner. The significance of the deviation from usual procedures can be fully evaluated only after a review of those procedures and how they have evolved.

For one third of a century — momentous in the annals of our society — the National Railroad Adjustment Board, and particularly for our present discussion the Third Division, has operated in a manner which has given a very large measure of effect to the intent of Congress as expressed in the Railway Labor Act to provide a means of settling labor disputes in the railroad industry growing out of grievances or the interpretation and appli-

cation of agreements. These disputes, known as "minor disputes", involve *matters of right — the intent and application of existing labor agreements* concerning rates of pay and working conditions — as opposed to matters of interest — attempts to secure agreement rights. Therefore, the sole function of the Adjustment Board is, and always has been, to consider the applicable provisions of agreements between disputant parties, weigh the facts of each particular dispute in the light of such agreement provisions and make a decision which will properly dispose of the dispute and thus implement the intent of Congress to foster labor peace in the industry.

The Supreme Court in its decision in TCU v. Union Pacific Railroad Company, 385 U.S. 157, interpreted the Railway Labor Act as requiring this Board to give broader consideration to the issues involved in the type of dispute now before us than has heretofore been its practice. It did not, however, basically change the functions of this Board as above described.

Congress provided that the Adjustment Board should adopt its own rules of procedure for handling disputes submitted to it, such rules, of course, to be consistent with the provisions of Section 3, Railway Labor Act. The Board did adopt such rules on October 10, 1934, and published them in its Circular No. 1, a document well known in the field. These rules contain in broad outline the procedures to be followed in submitting disputes to the Board. Each Division of the Board, acting from experience and a sincere desire to carry out its proper function, has from time to time by resolution, by custom and by practices mutually assented to by the members, adopted additional procedures governing its own deliberations and methods of reaching decisions.

The Third Division was given jurisdiction over disputes involving a larger proportion of railroad employes than any other Division. This, together with the well known fact that for the most part disputes involving these particular employes tend to become quite complicated, necessitating more detailed documentation and lengthy consideration, has resulted in a huge volume of work which could not expeditiously be handled except by adoption of procedures which permit simultaneous handling of many cases. Consequently, the Third Division has evolved such procedures. Routine matters have been delegated — with proper safeguards — to the Executive Secretary and his staff, so that in a large measure the Board members will be free to devote their "expertise" to the actual consideration of disputes and their disposition by proper decision in accordance with the intent of the Railway Labor Act.

Each case, upon being docketed, is assigned to one Carrier Member and one Labor Member. These two members constitute a "panel" which operates much like a Committee of any deliberative body. They make efforts to arrive at a decision, and if they do so, their judgment is generally accepted by the other members and adopted as the decision of the dispute by the Third Division.

Relatively few disputes are decided in this manner; most require the services of a referee, a neutral person, as provided for by the Act. When a referee is appointed he becomes, in effect, the third member of the "panel." He hears the other two members expound their views concerning the dispute, weighs the facts against the applicable agreement provisions, considers precedent and principles established by prior awards, takes cognizance of other applicable principles and knowledge, then proposes an award which con-

tains his decision of the dispute. Such a proposed award usually meets with the approval of one of the other "panel" members, whose judgment is accepted by his partisan colleagues. These members, voting with the referee, constitute the majority which Congress decreed would be sufficient to adopt the award and thus dispose of the dispute.

This method of handling disputes, although it relies heavily on the services of neutral referees, has worked very well for thirty-three years, and appears to be the only practical means of carrying out the intent of Congress with a Board made up of an equal number of partisan members representing management and labor.

As can readily be seen, the success of the Board's operations has been possible only by cooperation among the Board members in presenting the disputes to neutral referees.

When the present case, Docket TE-16786, was docketed, it was assigned, in the usual manner, to Carrier Member G. C. White and Labor Member J. W. Whitehouse. As noted above, the case was handled in substantially the usual manner up to the point where the file was closed and the case became mature for consideration.

Soon afterwards, on or about June 15, 1967, the Labor Member of the "panel", in deference to the stipulation of the parties to expedite the handling of this case, and realizing the futility of attempting to secure unanimous agreement on disposition of the dispute without the services of a neutral referee, conferred with the Carrier Member of the "panel" for the purpose of attempting to expedite the procedures for securing a referee (this process normally takes place shortly after the end of each month).

The Carrier Member was not receptive, however, and left the Labor Member with a distinct impression that the Carrier Members preferred to let selection of a referee proceed in the usual manner. There was no discussion of the merits of the dispute. No consideration whatever was sought or given with respect to any formal decision.

Then, on June 22, 1967, late in the afternoon, a document designated as a proposed award in Docket TE-16786, labelled "(Proposed by Carrier Members June 22, 1967)", was distributed to all members of the Third Division. This document was the same as that later adopted as Award 15724. Never before, for the entire history of the Third Division, has such a proposed award been issued without consulting the "panel" member who represents one of the parties to a dispute.

The Carrier Members proposed that this document be included on the agenda of an executive session of the Third Division scheduled for June 30, 1967, for adoption of several pending awards by four referees then serving with the Division. The Labor Member of the "panel", with the concurrence of the other four Labor Members, objected to the inclusion of this proposed award on the June 30 agenda.

However, on July 3, 1967, still without any discussion of the merits of the dispute with the Labor Member of the "panel", four of the Carrier Members invoked a rule of the Division to force an executive session on July 5, 1967, ". . . for the purpose of considering adoption of award proposed by Carrier Members on June 22, 1967, in Docket TE-16786."

On July 5, 1967, just prior to the convening of the Division in executive session, the Labor Members, as is customary, met in caucus to review the proposals to be acted upon. At that time Labor Member Kief stated that he was under positive instructions to vote for adoption of the Carrier Members' proposed award.

At the executive session of the Third Division, the Labor Member of the "panel" offered, as a substitute for the motion made by the "panel" Carrier Member to adopt the proposed award, a proposed resolution which would modify the rules and procedures of the Third Division to the extent necessary to insure participation by a neutral referee in decision of this and all other disputes where there was or might be a real or fancied conflict of interest among parties to disputes whose representatives are also members of the Third Division.

After debate on the question the motion to adopt the proposed resolution was lost, the vote being Labor Members Whitehouse, Barnes, Kasamis and Orndorff for adoption; Carrier Members White, Strunck, Carter, Naylor and Black, and Labor Member Kief against adoption. The motion to adopt the Carrier Members' proposed award then carried by vote of Carrier Members White, Strunck, Carter, Naylor and Black, and Labor Member Kief.

Thus, the action of Labor Member Kief in joining with the five Carrier Members to adopt their unilaterally conceived proposed award effectively prevented the following of usual procedures in selecting a neutral referee to make a decision in the dispute. This action also effectively deprived Labor Member Whitehouse, who was both a "panel" member of the Division assigned to handle this particular case and the representative of the respondent union, of any opportunity to discuss the dispute from the viewpoint of that union, or to urge consideration of the full facts and agreement provisions as revealed in the record of the case.

It is glaringly evident that the respondent union, the Transportation-Communication Employees Union, its members and their representative member of the Third Division were not accorded due process, which is one of the prime objectives of the rules of procedure of this tribunal. The six members whose action resulted in this deprivation thus flouted the clear intent of Congress and exceeded the jurisdiction given the Third Division by the Railway Labor Act. The Award, therefore, is a nullity, and should be so treated.

SECOND — The Award disregards the mandate of the Supreme Court expressed in Transportation-Communication Employees Union v. Union Pacific R.R., 385 U.S. 157 (1966), in which the Court set forth the statutory function and duty of the Adjustment Board in dealing with disputes of the kind involved in this proceeding.

It appears to be unnecessary here to recite in detail the inaccuracies contained in the description of the dispute used by the authors of the Award. It is enough to note that this part of the Opinion was written wholly from the viewpoint of the Carrier and the Brotherhood of Railway Clerks. The Opinion proceeds from the base that there is a presumption in favor of the action of the Carrier in assigning the work in dispute to employes represented by the Brotherhood of Railway Clerks and that the burden is upon the employes represented by the Transportation-Communication Employees to

rebut the presumption. Apparently, the presumption stems from no more than the fact that the Carrier made the assignment and that the Carrier is presumed to have acted correctly.

The Carrier's assignment of work is in any event a self-serving action which must be appraised in that light. It is, at best, only a factor to be considered with a number of additional factors if aids outside the language of the agreements are needed for their proper interpretation.

Nevertheless, the Board predicates what turns out to be a controlling presumption on that self-serving action. To rebut this presumption, the authors of the Award require the Transportation-Communication Employees to show that ". . . the work in dispute has been performed solely and exclusively by the party claiming the right to such work through practice, custom and tradition."

The test laid down by such reasoning is impossible to meet, as everyone with even a modicum of railroad experience knows. In the present case, it is nothing short of ridiculous. "The work in dispute", as envisioned by the authors of the Award, could not be used as a basis for any such test because it has not previously been performed by any group of employes of the Carrier. It is precisely because of disputes involving situations in which the work in dispute (in that sense) has not previously been performed that the Supreme Court charged the Adjustment Board to examine the terms of the applicable collective bargaining agreements not merely as they relate to work now being performed, but also, to consider such agreements in the light of evidence as to usage, practice, and custom pertinent to the agreements between the parties.

It was in such light that the Transportation-Communication Employees presented its case to the Adjustment Board. The Communication Employees showed that the work in dispute, as it really exists, and as it is clearly described in the record, is merely the same work — accomplished in a new and sophisticated manner — that was formerly performed by employes represented by the complaining Transportation-Communication Employees. It showed by competent and conclusive evidence that employes it represents not only had traditionally performed the work, but also that rules of its agreement with the Carrier provide for such employes' continuing right to perform it. It is significant that no mention was made by the majority of Rule 35.

It is even more significant that no mention was made by the majority in its Opinion of the basis for its conclusion that employes represented by the Brotherhood of Railway Clerks are entitled to the assignment of the disputed work. Under the U.P. decision, one of the functions of the Adjustment Board in this area is to determine, using specific criteria, which of two groups of competing employes is entitled to the assignment of the work, not merely whether the group of employes to whom the work was not assigned had an absolute right to the work. The Supreme Court specifically rejected this latter approach in NLRB v. Radio and Television Broadcast Engineers Union, 364 U.S. 573 (1961), which was cited in the U.P. case. It would be entirely appropriate for the Board to have determined in this case that, notwithstanding the Carrier's opinion to the contrary, as between the employes represented by the Transportation-Communication Employees and the employes represented by the Brotherhood of Railway Clerks, the work in dis-

pute should be assigned to the former group of employes on the basis of usage, practice, and custom pertinent to the applicable agreements. The Opinion of the majority shows that the majority did not even consider the possibility of its right to make such an award.

Finally, the Award, even if it were otherwise valid, is rendered invalid for failure to resolve the entire dispute. Thus, even if the Carrier properly assigned the work in dispute to the employes represented by the Brotherhood of Railway Clerks on the ground that the applicable agreements when read in the light of evidence to usage, practice, and custom pertinent to such agreements dictated such result, the Board also must resolve the issue of whether the agreement between the Carrier and the Transportation-Communication Employees requires the Carrier to pay monetary compensation to employes represented by the Communication Employees. Although the Award rendered by the majority, when examined verbally, could be taken to foreclose this issue, the whole tenor of the Opinion shows that the Board never even considered the issue.

The entire flavor of the Opinion reveals not only the fact but the reason why the representative of the Employes, the "panel" member of the Division assigned to handle the case, Labor Member Whitehouse, was excluded from all discussion of the dispute prior to circulation of the proposed award, and was prevented from having his arguments and opinion considered. This Opinion is quite clearly a contrived "decision" designed for the sole purpose of giving what seems to be an official blessing to the Carrier's fearful surrender to the demands of the Clerks.

The nation's railroad labor policies, as set forth in the Railway Labor Act, certainly do not contemplate the perversion of the National Railroad Adjustment Board into a vehicle for voiding the rights of a group of employes, secured in the orderly processes of collective bargaining. Yet, that is the effect of Award 15724.

Thus the Award is invalid, and we dissent.

**J. W. Whitehouse**
**C. R. Barnes**
**G. Orndorff**
**George P. Kasamis**

## ANSWER TO DISSENT TO AWARD 15724, DOCKET TE-16786

The Dissenters endeavor to show that the handling of the dispute in Docket TE-16786 was not in accord with the rules of procedure, customs and practices of the Third Division because a majority of the Board proceeded to make an award without the services of a neutral referee. But neither the Railway Labor Act nor the rules, customs and practices of the Board require that the services of a neutral be employed in all instances. In fact, the Railway Labor Act [Section 3, First (i)] plainly indicates that a neutral shall be appointed only in those instances where the Board fails to agree upon an award because of a deadlock or inability to secure a majority vote of the division members. [Section 3, First (n)]

The dissent states that each dispute, upon being docketed by the Division, is assigned to one Labor Member and one Carrier Member, and that these members then make efforts to arrive at a decision. This latter statement recognizes that awards may be rendered without the services of a referee without violating any rules, customs or practices of the Board.

As stated in the dissent, new cases, upon being docketed, are assigned to one Labor Member and to one Carrier Member. When a case is assigned to a Labor Member, it is automatically assigned to a particular member because each of them handles cases of specific labor organizations, and each Labor Member generally retains the case until the handling is concluded. But such is not always the case with the Carrier Members. New cases, upon being docketed, are assigned to one of the Carrier Members without regard to the labor organization involved and, with few exceptions, without regard to the carrier involved. But frequently the Carrier Member who is assigned to the case initially does not handle it to its ultimate conclusion. Many times, in order to equalize the work load, cases must be transferred from one Carrier Member to another when cases are being prepared for handling with a neutral.

The dissent then describes the handling of disputes with a neutral and comments to the effect that handling with a neutral appears to be the only practical means of carrying out the intent of Congress because of the partisan membership of the Board and that the success of the Board's operations has been possible only by cooperation among the Board members in presenting the disputes to neutral referees. Such discussion is merely an attempt to leave the impression that all disputes should be decided by a neutral, which, as previously indicated, is contrary to the provisions of the Railway Labor Act.

The records of the Division show that a number of cases have been decided without a referee, e.g., Awards 652, 653, 654, 655, 700, 1868–1874, by a majority vote. The Division's minutes in Awards 652, 653, 654, 655 and 700, Dockets TE-668, TE-669, TE-672, TE-681 and TE-472, respectively, disclose that by a majority vote the awards were adopted with Labor Member F. F. Cowley, Vice President, Order of Railroad Telegraphers, reserving the right to dissent, although he did not do so. Awards 1868–1874 speak for themselves. There was nothing in the handling of this case by the Division in any way improper under the Railway Labor Act.

With regard to Labor Member Whitehouse "conferring" with Carrier Member White on or about June 15, 1967, it must be pointed out that the so-called "conference" lasted but a few minutes, and originated with the Labor Member stopping in the office of the Carrier Member and stating there was disagreement between himself and Labor Member Kief as to the record closing date. Labor Member Whitehouse indicated that in his opinion the record had closed as of June 5, 1967, but that Labor Member Kief felt that the record did not close until June 15, 1967. Carrier Member White indicated his concurrence with the views of Labor Member Whitehouse that the record had closed on June 5, 1967. It was after such discussion that some further perfunctory discussion took place as to "deadlocking" the dispute, the Carrier Member being left with the impression that the Labor Members were not in accord that such action be taken. The Labor Member gave no indication of any desire to discuss the merits of the dispute either at that time or at some later date. His efforts seemingly were directed to securing

the services of a neutral after concurrence as to record closing date. The Dissenters point out that Labor Member Whitehouse realized the futility of attempting to secure "unanimous" agreement on disposition of the dispute without the services of a neutral referee. Section 3, First (n) of the Railway Labor Act merely prescribes a "majority" vote — not a "unanimous" vote, as the Dissenters well know.

The record in Docket TE-16786 shows that it was closed on June 5, 1967; that hearing before the Division was requested by the TCEU; that such hearing was scheduled for June 15, 1967, and that on June 12, 1967, counsel for the TCEU withdrew or cancelled the request for hearing. From June 12, 1967 on, it was in order for the Division to proceed to handle the case and the handling given, and complained of by the Dissenters, was in accord with and as contemplated by Section 3, First (l) and (n) of the Railway Labor Act.

As to the allegation that Labor Member Whitehouse, his Organization and the employes represented by the Organization were not accorded due process, the record reflects otherwise. The TCEU had the opportunity to present, in behalf of the employes it represents, its case orally to the Division, but Counsel for the TCEU withdrew or cancelled request for hearing before the Division. Thus, it cannot be said that any of the parties to the dispute were denied due process by any action of the Division, Further, Labor Member Whitehouse had the opportunity, had he so desired, to prepare his own proposed award for consideration by the Division, but did not do so for reasons best known to him. The minutes of the Division disclose that proposed awards have been submitted and adopted in many instances without the assistance of a neutral. The minutes also disclose that many proposed awards have been submitted by members of the Board other than a neutral and failed of majority vote. After the Carrier Members circulated their proposed award on June 22, 1967, and until it was adopted on July 5, 1967, Labor Member Whitehouse had sufficient time to discuss the merits of the case, but, again, and for reasons best known to him, chose not to do so.

Concerning the merits, the interpretation of the Scope Rule, as set forth in the Award, is the same as that many times applied by the Division in general-type Scope Rule cases. While the Dissenters may not like this interpretation, the case law in that respect is consistent.

Regarding the Scope Rule test, in one breath we find the Dissenters holding it inapplicable because "it [the work in dispute] has not previously been performed by any group of employes of the Carrier", but in the very next breath saying that the TCEU "showed by competent and conclusive evidence that employes it represents not only had traditionally performed the work, but also that rules of the Agreement with the Carrier provide for such employes' continuing right to perform it. It is significant that no mention was made by the majority of Rule 35." If the work had not previously been performed by any group of employes of the Carrier, it is difficult to see how the TCEU could have proved that employes it represents had traditionally performed the work, and as for Rule 35, neither party cited the rule in the record, because, apparently they did not deem it applicable. At any rate, the Rule not having been referred to in the record, there was no necessity for the Division to express any opinion on it.

The Dissenters' conclusion that the Award disregards "the mandate of the Supreme Court in Transportation-Communication Employees Union v.

Union Pacific R.R., 385 U.S. 157 (1966)" is without foundation. The record comprising Docket 16786 consists of submission by the Carrier, the Clerks and Telegraphers. They all contain a thorough consideration of "practice, usage and custom pertinent to all agreements." Each member of the Board had copies of all applicable agreements, and all members had the entire record before them in deciding the dispute. The Award quite plainly complies with that "mandate" as it considers not only the Telegraphers' Agreement, but the Clerks' Agreement, and the practices on the property pertinent to those agreements and determined on the basis of the record before the Division that employes represented by the TCEU on this Carrier's property had no agreement right to the claimed work. It necessarily follows that in the absence of such agreement right to the claimed work, the agreement does not require the Carrier to pay monetary compensation to employes represented by the TCEU.

In rendering this Award, the Division did comply with the requirements of the Act. The Award does conform with the Division's jurisdiction, and all parties to the dispute had every opportunity to submit anything in writing to the Division and to argue any aspect of the case desired. The award is sound, and the decision reached in full compliance with law and Division practices.

**G. C. White**
**R. E. Black**
**P. C. Carter**
**G. L. Naylor**
**T. F. Strunck**

## LABOR MEMBER'S REPLY TO LABOR MEMBERS' DISSENT *TO AWARD 15724, DOCKET TE-16786*

There is much that this writer could say in answer to the dissent which has been filed by four Labor Members to Award 15724, but the record in the dispute as embodied in the briefs of the parties and the Award itself contains sufficient answer to all but one point which has been raised by the dissenters. This answer will confine itself, therefore, to the third full paragraph on page 4 of the dissent, where the Labor Members allege that I stated I was under positive instructions to vote for adoption of the Carrier Members' proposed award.

I do not deny that I had occasion to discuss certain aspects of this case with officers and staff assistants of the Brotherhood of Railway Clerks. I have discussed other important cases with such officers and staff assistants in the past, and I would expect to do the same when future occasions warrant. Nevertheless, it was the record in Docket TE-16786 and the total lack of merit in the position taken by the Transportation-Communication Employees Union which compelled my vote in favor of the award adopted by the majority in Docket TE-16786.

So that there may be no doubt in anyone's mind, I gave very careful consideration to all of the record in Docket TE-16786. The briefs filed by the Transportation-Communication Employees Union were carefully studied, as

were the briefs filed by the Railroad and by the Brotherhood of Railway Clerks. In my mind, the record is clear that the Transportation-Communication Employees Union has no valid claim to the work and positions they sought to obtain in Docket TE-16786. A denial award was in order. Accordingly, in voting with the Carrier Members for the award adopted in Docket TE-16786, I voted my own convictions on the merits of the dispute which had been submitted to our Board.

It grieves me greatly to have to point out that the four Labor Members have been rather loose with the truth in their dissent insofar as that dissent pertains to the handling of the case at this Board. I do not believe it well to belabor the point, as to do so will only create further dissention and shed no real light on the dispute which has been decided in Award 15724. That Award accurately decides the dispute in Docket TE-16786, and it was arrived at only after the most careful consideration of the entire dispute.

C. E. Kief
Labor Member
8-14-67

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